251 - ATT

CC 96-98

RECEIVED
APR 25 '96

DOCKET FILE COPY ORIGINAL

SUGGESTED LANGUAGE FOR A PRO-COMPETITIVE NOTICE OF PROPOSED RULEMAKING ON SECTIONS 251 AND 252

THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION ("COMPTEL")

March 29, 1996

No. of Copies rec'd 1
List ABCDE

TABLE OF CONTENTS

SUGGESTED LANGUAGE FOR A PRO-COMPETITIVE NOTICE OF PROPOSED RULEMAKING ON SECTIONS 251 AND 252

This paper identifies the issues that CompTel believes are central to the Commission's effort to implement Sections 251 and 252 of the Telecommunications Act of 1996. 1/ The paper is presented in the form of a draft notice of proposed rulemaking. This has been done for two reasons: first, to assist the Commission staff as they prepare the NPRM under very tight time pressures, and second, to stand as a companion document alongside the proposed NPRM provided last week to the Commission by the seven regional Bell operating companies and GTE. The paper sets forth the questions upon which the Commission must seek comment in order to develop a full record upon which to base their final decision. We welcome discussion and debate on the issues raised in this paper.

I. INTRODUCTION

1. On February 8, 1996, the President signed the Telecommunications Act of 1996 (the "Telecom Act", the "1996 Act" or the "Act") 2/, thereby taking the first step towards the creation of a new, far more competitive telecommunications industry in this country. This Notice requests comments on implementation of new Section 251 of the Communications Act of 1934 ("the Communications Act"). That provision establishes the core interconnection obligations of all telecommunications carriers, including incumbent local exchange carriers ("LECs") and other carriers that will provide local exchange services in the future. This Notice also addresses aspects of new Section 252, where certain of the carrier obligations under Section 251 are specified in additional detail.

2. The Telecom Act gives Section 251 a particular priority. One of our first responsibilities under the Act is to "complete all actions necessary to establish regulations to implement the requirements of this section." 3/ Establishing the fair rules of competition is appropriate, for much depends upon all parties having a clear understanding of the specific obligations that the Act imposes on carriers, both incumbent LECs and their competitors.

3. Once those obligations are clarified, the role of regulators can be substantially reduced. For example, Section 252 creates innovative procedures under which carriers will negotiate interconnection agreements. However, that process will work properly

1/ This paper does not attempt to cover every aspect of implementation of Sections 251 and 252. We do not intend to suggest by focusing on certain subsections that the subsections that we do not address herein are not equally important to the development of competition.

2/ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

3/ 47 U.S.C. § 251(d).

only if all parties begin with a common understanding of the duties of the carrier to whom an interconnection request is made. 4/ Similarly, the arbitration process under Section 252 also requires clarification of carrier obligations, for they will form the legal basis for a determination in any given case. 5/

4. Conversely, if we do not meet our statutory responsibility to spell out Section 251 obligations in detail here, then the result may well be the need for more regulatory intervention later. The negotiation process foreseeably could be marred by continuing legal disputes among the carriers as the Section 251 obligations instead are litigated one by one. This process would be burdensome for both ourselves and state commissions. Much more important, it would substantially delay the development of the competitive markets promised by the Telecom Act.

5. We recognize that the Act requires fundamental changes to the rates, terms and conditions under which carriers have interconnected their networks in the past. 6/ However, such changes are unavoidable if the nation is to move to an entirely new environment of vigorous competition across all telecommunications services. Past policies and rules based on monopoly and line of business restrictions are not sustainable. The negotiation and arbitration process, guided by the policies adopted here, now will replace burdensome and constraining regulation of the past.

6. In carrying out our responsibilities under the Act, including our duty under Section 251, we are mindful of the important role that the states will play in developing competition in local markets. We will give particular attention to the comments of states regarding their experiences. At the same time, the Telecom Act gives the Commission the role of ensuring that competition occurs broadly, under consistent principles and practices. The policies and rules we adopt in this proceeding will provide a foundation under which both the states and the Commission will be able to promote the fundamental goal of the Act -- increased choice for consumers. This competition will speed the evolution of the nation's information infrastructure, create thousands of new jobs, and prepare the nation itself to compete in the world information society of the next century.

7. For these and other reasons the Telecom Act requires us to establish

---

4/ Id. at § 252(a).

5/ Id. at § 252(c). Similarly, Section 252(e)(2) provides that state commissions may reject an interconnection agreement if does not meet "the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251, or the standards set forth in subsection (d) of [section 252]." See also 47 U.S.C. § 252(f)(2) (state commission may not approve statements of generally available interconnection terms and conditions unless they comply with Section 251, the FCC's regulations thereunder, and the pricing standards of Section 252(d)).

6/ See Joint Explanatory Statement of the Committee of Conference regarding the Telecom Act, at 8 ("The conference agreement adopts a new model for interconnection . . .")

regulations to implement the requirements of Section 251 by August 8, 1996. 7/ We fully intend to meet this deadline so that competitive market forces can be unleashed to the maximum extent possible.

II. BACKGROUND

8. Historically, the Commission has operated under a statute that has presumed the existence of an absolute telephone monopoly, and hence the absence of consumer choice. Indeed, some of the primary barriers to entry protecting that monopoly have been legal prohibitions on competition. 8/ In contrast, the Telecom Act contemplates the development of many new service providers, competing among each other to best meet customer needs. The Act eliminates remaining legal barriers to competition. 9/ It also provides tools for the Commission and the states to create an environment of robust competition.

9. Section 251 is a cornerstone of the 1996 Act because it establishes the necessary means by which widespread telecommunications competition can take place. This competition will develop through a variety of network and service configurations (sometimes referred to as a "network of networks"). Different service providers will interconnect with each other, use each other's network components, and sell capacity to each other. The Telecom Act wisely does not prejudge how this "network of networks" will develop. The Act is written flexibly in recognition that circumstances among carriers will change over time as competition takes root and technology advances. It permits the market to shape where new facilities can be deployed most efficiently to enhance consumer choice and reduce costs. 10/

7/ Id. at § 251(d).

8/ The Commission began to take steps to foster telecommunications services competition in the 1970's, and has accelerated that process over the past decade. However, we have on occasion been hampered by limitations in our statutory authority. Similarly, many state utility laws have contained direct or indirect restrictions on competition. The Telecom Act addresses these constraints in many respects.

9/ See, e.g., 47 U.S.C. § 253.

10/ We note that in the future we expect carriers to compete with one another across services and across geographic areas. Conventional distinctions between "local carriers" and "long distance carriers" may lose their meaning. These distinctions are more the product of old laws and regulations than markets and consumer preferences. We intend to implement the Telecom Act with a goal of freeing these market forces as much as possible. The Act sets the stage for competitors to design new service offerings and pricing packages that may be inconsistent with conventional labels of local and long distance. For example, it may be that some new entrants will try to win customers from the incumbent LEC by offering unlimited "free" calling to a broader service area for a flat monthly rate. A number of states have similarly seen some LECs convert toll calls to local calls through "expanded local calling." It is not our intent to interfere with such competition through regulatory constraints. We invite comment on how our implementation of Sections 251 and 252 can

10. At the same time, the Telecom Act also recognizes the unique status of the incumbent LEC network today. That monopoly network is a national resource of tremendous value and importance. The LECs alone control local loops to every home and business in the country -- over 147 million in all. 11/ The LECs operate over 17,000 local switches 12/ that together route virtually every local and toll call placed by any caller in the nation -- representing over 522 billion calls in 1993, (of which only 77 billion were toll). 13/ And the LECs own about 2.5 billion kilometers of cable and wire facilities. 14/

11. When the Communications Act was adopted in 1934, it was assumed that these LEC local networks were by definition monopoly facilities. This assumption was also the foundation of the 1982 Consent Decree pursuant to which the Bell Operating Companies ("BOCs") were divested from AT&T. 15/ The Consent Decree rested on showings that AT&T had used its control of the monopoly local exchange facilities of the Bell System to discriminate against its new long distance rivals. The Decree created the foundation for a competitive long distance industry by establishing the ability of all toll carriers to use the exchange network of the BOCs on the same basis as AT&T. The BOCs were prohibited from discriminating in favor of AT&T with respect to pricing or service quality. The Decree created equal access procedures and operational systems that made it easy and inexpensive for customers to switch long distance companies quickly and without any disruption in service. 16/ Over time, these principles bore fruit in the form of a competitive long distance industry, albeit one in which all carriers originated and terminated their services over the monopoly LEC network. 17/

12. The 1996 Act sets the stage to advance competition into the monopoly local exchange network itself. We strongly welcome this initiative. For several years we and the states have been working to expand exchange competition, but that policy has been hampered

---

proceed without reference to how carriers use the interconnection services they purchase from each other.

11/ See Statistics of Communications Common Carriers (FCC 1993/1994), Table 2.5, pp 20-21 (Total Switched and Special Access Lines for Reporting Local Exchange Companies as of Dec. 31, 1993).

12/ See Infrastructure of the Local Operating Companies Aggregated to the Holding Company Level, Industry Analysis Division, Common Carrier Bureau, FCC (April 1995).

13/ See Statistics of Communications Common Carriers, supra, Table 2.6, p. 22.

14/ See id., Table 2.2, pp. 12-14.

15/ See United States v. Western Electric Co., 552 F. Supp.131 (D.D.C. 1982), aff'd mem. sub nom. Maryland v. United States, 460 U.S. 1001 (1983).

16/ See id., Appendix B.

17/ See, e.g., Notice of Proposed Rulemaking, Policy and Rules Concerning the Interstate, Interexchange Marketplace, FCC 96-123, at 3-4, CC Docket No. 96-61 (released Mar. 25, 1996).

by out-of-date restrictions in the Communications Act and state communications laws. 18/

13. The 1996 Act is elegant and foresighted in its refusal to predict how quickly or extensively incumbent local exchange carriers will face competition. We are optimistic that if the Act is implemented correctly, with all parties exercising good faith, consumers will enjoy the benefits of the "network of networks" quickly. However, we also recognize the marketplace reality that, particularly at first, not all carriers come to the table with even near equal bargaining power.

14. Section 251 establishes the core principles under which carriers will meet their obligations to create the "network of networks." In this Notice we propose policies and rules to implement these obligations, including the pricing standards applicable to certain of these obligations that are set out in Section 252(d). As required by the Act, particular duties apply to the incumbent LEC. The Act recognizes that, especially at this time, all other carriers will depend on the incumbent LEC network to a substantial extent. The Act creates options for how that network can be employed as the "network of networks" evolves.

15. Section 252 also contains procedures by which carriers will negotiate agreements with one another. It is our goal to clarify carrier obligations under Section 251 with some specificity here so that the negotiation process can proceed with a minimum of disputes and regulatory intervention. We would expect carriers to be better able to fulfill their statutory obligations in the negotiation process when they adequately understand the scope of their respective rights and duties. The more definition we can bring to Section 251 now, the less need there will be for oversight later by state commissions, ourselves or the federal courts. In this way the deregulatory goals of the Act can be met to the fullest extent possible.

16. We also recognize that Sections 251 and 252 have independent relevance to our responsibility under Section 271 to evaluate applications by the RBOCs for permission to provide interLATA services within their regions. In order to meet the competitive checklist in that section, the "access or interconnection provided or generally offered" by the RBOC must meet the statutory requirements of Sections 251 and 252. 19/ We believe that the RBOCs will have the best opportunity to make a satisfactory Section 271 showing if they receive clear guidance in our rules as to what is expected of them. 20/

17. We are well aware that creating rules is not the same thing as creating

18/ For example, we and the states have devoted substantial efforts to expanded interconnection initiatives in an attempt to create opportunities for new facilities carriers to interconnect with the LEC on reasonable terms. The Act, however, goes much further, recognizing that carriers also must have the ability to use the LEC network itself on cost-based and non-discriminatory terms.

19/ 47 U.S.C. § 271(c)(2)(B).

20/ A complete understanding of Section 251 obligations also will simplify the process of reviewing RBOC applications under Section 271.

competition. Nevertheless, we believe that once all parties understand their respective obligations to make their networks available to each other, they will work together to meet those obligations. In this way they will swiftly meet the Act's goal of creating a "network of networks," with the shape of those networks evolving and expanding to meet market requirements. Regulatory intervention then can be minimized.

18. The result will be many carriers competing to design better, cheaper telecommunications services provided over the nation's overall network resource. That is the promise of the Telecom Act, and we are determined to do our part to bring that promise swiftly to fruition.

III. CARRIER OBLIGATIONS UNDER SECTION 251

19. The Telecom Act recognizes that all carriers have responsibilities to work with one another to share the nation's telecommunications infrastructure and maximize its efficient use. At the same time, the Act also recognizes the unique position of the incumbent LEC local exchange network.

20. The Act therefore strikes a balance, imposing a general duty on all carriers to interconnect with each other, and additional duties on local exchange carriers and especially incumbent LECs. It necessarily follows that as the Commission considers rules to implement the 1996 Act, those rules similarly should focus particular attention on the need of other carriers for interconnection and use of the incumbent LEC's network.

21. The Telecom Act also strikes another balance, one between the federal interest and that of the states. The Act provides a central role for the states in the implementation of Section 251, consistent with their long-standing expertise regarding local exchange service. At the same time, the Act also recognizes the national interest in broad-based telecommunications competition under consistent policy principles. It gives the Commission responsibility to establish policies and rules to govern the Section 251 obligations of carriers. We and the federal courts also have oversight responsibilities to see that those policies are carried out.

22. The tentative conclusions set forth in this Notice are written with these goals in mind. We encourage parties to help us with additional specific suggestions of ways that we can create clear guidelines for carriers regarding their duties under Section 251. We believe that such guidelines will minimize later disputes among interconnecting carriers, make for fewer occasions when we or the states will be required to resolve such disputes, and most importantly, expedite the delivery of new competitive services to the public.

23. These matters are discussed further below.

A. Section 251(a) -- General Duty of Telecommunications Carriers

[* * * *]

B. Section 251(b) -- Obligations of All Local Exchange Carriers

[* * * *]

C. Section 251(c) -- Additional Obligations of Incumbent Local Exchange Carriers

24. Section 251(c) establishes additional specific responsibilities for incumbent local exchange carriers. 21/ This section recognizes that in order for new companies to compete with the incumbent LEC, they necessarily will need to make use of the ubiquitous exchange network installed by the LECs during their period of legal monopoly. Section 251(c) is in many ways the cornerstone of the Telecom Act. It provides the means by which other carriers may offer services to the public without having to first replicate the LEC network. We fully expect new local facilities networks to develop in many areas of the country. However, that process will take time, and in any event will require interconnection of those facilities with the ubiquitous LEC network. If the LECs deny their new rivals reasonable and nondiscriminatory use of the existing network, then competition with the LECs will be thwarted and the Act's purpose will not be met. 22/

25. We therefore take very seriously our statutory responsibility to ensure that the incumbent LECs meet their obligations under Section 251(c). We intend to ensure that LECs do not frustrate the pro-competitive purposes of the Act by abusing their control of the exchange network. In the past our concern has focused on discrimination against competing long distance companies. The AT&T divestiture was ordered to address this problem. The Act now eliminates the Consent Decree and sets the terms by which the in-region interLATA restriction on the BOCs may be eliminated. 23/

26. This makes it all the more important for the FCC and the states to adopt rules and implement them in a manner that prevents LECs from using their networks in anticompetitive ways against other carriers -- carriers who now will depend upon LEC loops, switching and transport for both exchange access and local services. This dependence will be nearly universal in the short term while competing facilities networks are deployed. It also may continue indefinitely in those locations where new construction is not justified by the market. 24/

21/ 47 U.S.C. § 251(c)(3).

22/ We note that long distance companies have claimed that LEC discrimination could also lead to a reduction in existing interexchange competition. They suggest that to the extent consumers prefer "one stop shopping" for their local and long distance needs, LEC discrimination would mean that only the LEC could meet that need. As a result, the level of competition that we now enjoy in the long distance market could substantially erode. We invite comments regarding the likelihood that this problem will arise.

23/ See 47 U.S.C. § 271(d)(3). Similarly, the 1996 Act eliminated the safeguards contained in the antitrust consent decree applicable to GTE. See id. at § 601(a)(2).

24/ As discussed elsewhere, the Act does not require the Commission to predict when and where competing networks will develop. The Section 251 obligations on carriers exist independently of that question. However, as carriers have alternative local network options, that market fact will further enhance the process of negotiating interconnection agreements, and further reduce the need for regulatory oversight under Section 252.

27. As set out below, we propose to adopt rules to implement Section 251(c) and request comment on how detailed those rules should be. Our proposals address: (i) the definition of the LECs to whom the obligations should apply; (ii) the obligations themselves: and (iii) the special duty of LECs to negotiate terms and conditions to meet these obligations. We also address Section 252 insofar as it provides more specific mandates as to how the LECs shall meet certain of their Section 251 duties. We encourage parties to comment on these proposals, and to identify any additional obligations they believe are called for by these sections of the Act.

1. Definition of an Incumbent LEC

[* * * *]

2. Obligations of Incumbent LECs

a. General Policy Goals of the Act

28. Section 251(c), as supplemented by Section 252, establishes four different ways that an incumbent LEC must make its network available to other carriers. Such LECs must: (1) interconnect their networks with other networks for the transmission and routing of telephone exchange and exchange access; 25/ (2) offer the elements of their local network in unbundled form, including providing any requesting carrier the ability to combine these elements; 26/ (3) offer their retail local exchange services for resale at wholesale rates 27/; and (4) provide collocation at their premises 28/.

29. These alternatives are not mutually exclusive. Non-incumbent LECs may draw on any or all of them. The Telecom Act creates this menu of options, and leaves actual network configuration decisions to the "requesting carriers" and the market. 29/

25/ Id. at § 251(c)(2).
26/ Id. at § 251(c)(3).
27/ Id. at § 251(c)(4).
28/ Id. at § 251(c)(6).
29/ In addition, Section 251(c) imposes two related obligations on the incumbent LECs regarding how they must meet their basic interconnection duties. LECs must provide notice of changes to their networks "that would effect the interoperability of those facilities or networks." 47 U.S.C. § 251(c)(5). This obligation is critical to making the interconnection options of Section 251(c) available on a practical, nondiscriminatory basis. We invite comment on the process by which such network information should be made available.

Finally, incumbent LECs have a duty to negotiate agreements with requesting carriers to "fulfill" their interconnection obligations. Id. at Section 251(c)(1). This negotiation duty is discussed further below. See Section III.c.3., infra.

30. As a general rule, these options must be priced according to cost standards set forth in Section 252(d) and provided on a non-discriminatory basis. 30/ The Act thereby provides that other carriers will be able to use the incumbent LEC network to compete with the LEC in the provision of such carriers' own local exchange and exchange access services. A LEC cannot block such competition by offering use of its network to a rival only at non-cost-based levels.

31. The Act's Section 251 requirements have several profound consequences for the nation's telecommunications infrastructure. First, other carriers can begin a form of local exchange and exchange access service competition quickly, even though they largely will be dependent on the monopoly LEC network. Rather than being an absolute barrier to entry, the ubiquitous LEC network becomes a vehicle for entry. New service providers are able to use that network in part or in whole as inputs to the creation of their own product offerings for businesses and consumers. We view Section 251(c) as fundamental to meeting the Act's pro-competitive goals at the earliest possible date.

32. In that regard, we are not unmindful of the low entry barriers to the interLATA market. Four national interexchange networks and many smaller regional networks compete vigorously for the business of both other long distance carriers and end user customers. Within days of passage of the Telecom Act, several of the RBOCs and GTE signed agreements to acquire interexchange capacity that they can use to design toll services for subscribers. A fully-automated PIC-change process is capable of handling high volumes of orders every day for customers seeking to change their long distance service provider. It is important that other carriers have a similar opportunity to use the LEC's local network to design their own services. The Act properly recognizes that pricing rules and other safeguards are necessary to ensure that this opportunity exists in a practical form.

33. Second, Section 251(c) creates a foundation for efficient deployment of competing network facilities. We fully expect new wireline networks to be built over time in many sections of the country. Fiber rings and limited other local network capacity already is in place in a number of cities. However, we are not in a position to (and should not) predict where and how quickly future construction will occur. Nor should we create rules that artificially favor some forms of investment or technology over others. The Act avoids such burdensome regulation by giving carriers a general right to use the LEC network how and where they see fit at cost-based prices.

34. We anticipate several forms of entry under the Act's structure. Many new competitors commence local service using the LEC network in whole or in substantial part,

30/ See 47 U.S.C. § 252(d). The Act also creates an opportunity for a requesting carrier to negotiate an interconnection agreement that does not meet the requirements of Section 251(b) or (c). See id. at 252(a)(1). However, such non-complying agreements do not relieve incumbent LECs of their obligations to satisfy Section 251 in other cases. Nor would such agreements meet the checklist obligations on the RBOCs under Section 271(c)(2)(B).

and then gradually substitute their own newly-constructed facilities or those of other carriers. This approach may be particularly attractive to long distance companies who market their services widely and have geographically disparate customer bases to defend and enhance. Long distance firms have argued that to become "full-service carriers" and compete with the LECs, they will have to use substantial parts of the LEC network at first. 31/ They state that they expect to become less dependent on the LEC later as they build new network or have alternative sources of supply.

35. Alternatively, some carriers with limited local network may target downtown business districts, using relatively less of the incumbent LEC's network to serve their niche market. 32/ Cable companies may use their existing plant to compete to serve the residential market. Wireless networks also may begin to substitute some facilities for those of the incumbent wireline LEC. In each of these cases, however, these carriers also will be dependent upon use of the incumbent LEC network to a significant extent.

36. Finally, some carriers may enter the exchange market by reselling the retail local exchange services of the LEC itself, but allowing the LEC to continue to offer exchange access to the non-LEC's subscribers. Recognizing that in these circumstances the LEC retains access revenues to help cover its costs, the Act provides that a non-LEC pays a wholesale price calculated solely from the LEC's retail price less avoided cost. 33/

37. Again, none of these options are mutually exclusive. The Telecom Act allows carriers to use a combination of tools to create their services. This flexibility of Section 251(c) leads to a third major benefit of the Act. It permits the Commission and other regulators to avoid having to make predictions regarding whether and how fast wireless services or other technologies may develop as substitutes to the LEC local network. Under Section 251(c) the obligations on the incumbent LECs exist independently of how the dependence of other carriers on the LEC network may decline in the future.

38. That said, we anticipate that regulatory oversight of how the incumbent LECs meet their obligations will be less necessary in the future as alternative local networks become more common. The negotiation process contemplated by Section 252 then should run more smoothly. If requesting carriers have alternatives to the incumbent LECs, then the bargaining positions of the parties changes. We anticipate that in these circumstances market forces may provide new incentives for LECs to meet the needs of other carriers, irrespective of their statutory obligation to do so. At that point the "network of networks" will be growing smoothly and without need for regulatory oversight. However, requesting carriers

31/ See, e.g., "The Pressing Need for Wholesale Local Exchange Services," LDDS WorldCom White Paper, July 1995; Gillan and Rohrbach, "Diversity or Reconcentration? Competition's Latent Effect," Public Utility Fortnightly, June 15, July 1, and July 15, 1994.

32/ For example, this appears to be the initial business plan of certain carriers who began constructing alternative access networks and now intend to install switches in selected locations.

33/ See 47 U.S.C. § 252(d)(3).

have few such options today. They remain dependent on use of the LEC network, and their rights to do so granted by Section 251.

39. A fourth benefit of Section 251(c), and ultimately the most important, is the flexibility it provides to bring the benefits of competition to all segments of the nation: urban, suburban and rural; large users and small. We recognize that it may never be economical to construct new competing local network facilities in some parts of the country, and that such competing facilities may be delayed for a long time in others. Section 251(c) creates a mechanism by which new carriers can still offer competing services to subscribers in those regions, using the preexisting network of the incumbent LEC. 34/

40. In these circumstances, we are tentatively of the view that we should state in some detail how the incumbent LECs should satisfy their interconnection obligations under Section 251(c). We discuss this matter more specifically below, and invite parties to comment on our initial conclusions.

b. Specific LEC Obligations

i. Section 251(c)(2) -- Interconnection

41. Section 251(c)(2) imposes upon incumbent LECs "[t]he duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network . . . for the transmission and routing of telephone exchange service and exchange access . . ." 35/ This obligation is broader than the general duty to interconnect imposed upon all telecommunications carriers under Section 251(a)(1). Requesting carriers may receive interconnection "at any technically feasible point," and that interconnection must be provided on a non-discriminatory basis and priced at cost. 36/ We tentatively conclude that we should specify the nature of the incumbent LEC's obligation to provide interconnection under Section 251(c)(2) given the critical importance of interconnection to the ability of other carriers to complete calls to LEC customers.

Eligibility for Interconnection

42. The plain language of Section 251(c)(2) requires that incumbent LECs provide interconnection to "any requesting telecommunications carrier." A "telecommunications carrier" is further defined as any carrier offering telecommunications service (except aggregators). 37/ By definition, then, a "telecommunications carrier"

34/ For example, in less dense population areas it may not be efficient to overbuild the LEC facilities. However, businesses and consumers still could have a form of competition in those regions as other carriers purchase the use of the LEC exchange network, and then compete with the LEC to offer more attractive service plans and pricing.

35/ 47 U.S.C. § 251(c)(2).

36/ Id. at § 251(c)(2)(B)-(D).

37/ 47 U.S.C. § 153(a)(49).

includes all carriers -- whether offering long distance service, mobile service, or local exchange and exchange access (with the sole exception of "aggregators").

43. We tentatively conclude that Section 251(c)(2) therefore requires LECs to provide interconnection with the local exchange network to any telecommunications carrier regardless of whether they are providing what has traditionally been considered "toll" or "local exchange" telephone service or both. Thus, Section 251(c)(2) includes interconnection between a telecommunications carrier's long distance network and an incumbent LEC's local network in order to originate and terminate toll calls, just as it includes the interconnection between another carrier's local network and that of an incumbent LEC for purposes of terminating local calls. We also note, in this regard, that the function of interconnection with a local exchange network appears to be the same regardless of the nature or origination point of the call that is to be terminated on the local network. Whether the call comes from another state or another part of town, the function of terminating that call is fundamentally the same. Thus, what is commonly referred to as "interexchange access" appears to be the same function as "local call termination" or "interconnection." We seek comment on this point.

44. We also ask for comment on another interpretation of Section 251(c)(2)(A), one advanced by several local exchange companies. These companies argue that in order to assert a right to interconnection, a "requesting telecommunications carrier" must be a provider of telephone exchange service and exchange access service. We seek comment on how this reading of the Act can be reconciled with the Act's plain language, which requires LECs to provide interconnection to "any requesting telecommunications carrier." 38/ We also ask for comment as to how, if we were to accept this reading of the Act, we would distinguish between local exchange carriers, who would qualify for interconnection rights, and toll providers, who would not. We note that the definitions of "telephone exchange service" and "telephone toll service" under the 1934 Act 39/ do not clearly define the scope of local exchange versus toll services, and that the distinction between the two types of calls would appear to be largely one of pricing. As noted above, new entrants will not necessarily adopt the same local/toll calling distinctions that the LECs currently use, and that the LECs themselves may at some point alter their own definition of what they consider to be local exchange versus toll service. Nor would we be inclined to adopt regulatory rules that would interfere with that market process. 40/ Parties who wish us to interpret the 1996 Act to permit such distinctions should explain their positions in detail.

Point of Interconnection

45. Section 251(c)(2)(B) requires incumbent LECs to provide interconnection "at any technically feasible point within the carrier's network." This provision is important because it maximizes the ability of other carriers to interconnect with LEC facilities at points

38/ Id. at § 251(c)(2).
39/ 47 U.S.C. § §§ 153(r),(s).
40/ See note 9 supra.

of the requesting carrier's choosing. As a result, competitors can maximize the efficiency of their own networks (and their ability to substitute alternative facilities for those of the LEC in the future).

46. We tentatively conclude that we should adopt general principles to guide the states and this Commission in determining whether this interconnection requirement has been met. We also tentatively conclude that LECs should bear the burden of proving that a requested interconnection point is not technically feasible. We seek comment on what factors should be significant in evaluating whether that burden has been sustained. For example, what relevance should the fact that another LEC is providing interconnection at a similar point have on a LEC's refusal to provide interconnection? We seek comment on this approach, and ask the parties to identify what other principles should apply, including specific suggestions for rule provisions as well as justifications for proposing such provisions.

Pricing and Non-discrimination

47. Subsections 251(c)(2)(C) and (D) require interconnection to be "at least equal in quality" to that provided by the LEC to itself. Furthermore, LECs must offer interconnection "on rates, terms and conditions that are just, reasonable, and nondiscriminatory" and in accordance with the requirements of negotiated agreements and Section 252. Section 252 requires, *inter alia*, that rates be "based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection" and "may include a reasonable profit." 41/

48. In our view, these provisions are critical to the effectiveness of the Act's interconnection requirements. If a LEC prices interconnection to its rivals substantially above its cost, or if the LEC itself is effectively paying less than its competitors for use of the same network facilities, then the ability of new entrants to compete with the LEC could be significantly impaired. We ask for comment on how best to implement these statutory provisions. In this section and in the section of the Notice below concerning Section 251(c)(3), we seek comment on how to define "cost-based" pricing. We tentatively conclude, as discussed below in connection with Section 251(c)(3), that "cost-based" means "based on economic cost."

49. We also seek comment on how best to give effect to the Act's requirement that rates for interconnection be nondiscriminatory. 42/ We tentatively conclude that rates must be based on economic cost under these provisions of the Act as well, because the LEC's own input cost for interconnection appears to be equal to economic cost. We seek comment on this tentative conclusion.

50. These proposals are drawn from the plain language of the statute. They

41/ 47 U.S.C. § 252(d)(1).

42/ See 47 U.S.C. § § 251(c)(2)(D), 252(d)(1)(A).

will foster the "network of networks" that the Act is meant to bring about. We understand that these Section 251(c) obligations necessarily create pressure on the existing access charge rules under Part 69. However, those rules were written in an environment in which LECs enjoyed a local exchange monopoly. The access rules have increasingly come under pressure as new services and competition developed over the past decade. For example, information services and private networks have been excused from the access system. 43/ More recently, we have seen the establishment of different access/interconnection arrangements for the origination and termination of calls transiting mobile services. 44/ And as states have begun to promote local exchange competition, they have developed alternative interconnection pricing plans in lieu of access. 45/

51. We tentatively conclude that it will be impossible to continue these artificial inconsistencies among carriers in the environment of a "network of networks," and that, in any event, the Telecom Act forbids us from doing so. Section 251(c)(2) recognizes that in a competitive market regulatory distinctions cannot interfere with market decisions regarding how a requesting carrier uses the local network. Uneconomic price differences that could be sustained in a period of monopoly cannot continue in a competitive market.

52. We invite comments on this tentative conclusion. Parties who disagree with this conclusion should explain in detail how they would distinguish between interconnection for the purpose of local exchange service and exchange access, as opposed to interconnection for other purposes. 46/ We also invite suggestions as to how we should

43/ Third Report and Order, MTS and WATS Market Structure, CC Docket No. 78-72, 93 FCC 2d 241, 258 (1983), as modified on reconsideration, 97 FCC 2d 834, 712-16 97 FCC 2d 834, 874-77 (1984) aff'd in part and remanded in part, National Association of Regulatory Utility Commissioners v. FCC, 737 F.2d 1095 (D.C. Cir. 1984) ("NARUC"), cert. denied, 469 U.S. 1227, 105 S.Ct. 1224, 84 L.Ed.2d 364 (1985), modified on further recon., 99 FCC 2d 708 (1984), 101 FCC 2d 1222 (1985), aff'd on further recon., 102 FCC 2d 849 (1985).

44/ Mobile service interconnection issues are under review in a pending Commission docket. See Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185, Notice of Proposed Rulemaking, FCC 95-505 (Released January 11, 1996). We request comments as to how that docket and the policies to be developed thereunder should be harmonized with the obligations of incumbent LECs under Section 251.

45/ See., e.g., Application of MFS-I of Maryland, Inc., Maryland PSC Case No. 8584, Phase II, Order No. 72348 (December 28, 1995) at 32 (adopting interconnection rates of $.05 per minute for tandem interconnection and $.03 per minute for end office interconnection).

46/ We also request comment on the impact of Section 251 on our existing access charge rules. We have tentatively concluded that carriers who negotiate for interconnection can use interconnection for the provision of any service. It may be that our Part 69 rules may continue to have a place to govern interexchange access in the absence of an agreement between carriers arrived at pursuant to Section 252, or for other purposes. We also request

transition to the cost-based interconnection pricing required by Section 251(c)(2). How, if at all, is this transition related to proceedings under way to meet the universal service requirements of Section 254 of the Act?

ii. Section 251(c)(3) -- Unbundled Access

53. The next obligation of the incumbent LEC is to allow "any requesting carrier" to obtain the use of "network elements" on an unbundled basis. The carrier can use those elements to provide "a telecommunications service." The Telecom Act specifically provides that the LEC must provide the elements "in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications services." 47/

54. Section 251(c)(3) is central to the 1996 Act because it creates the means by which carriers may use elements of the ubiquitous incumbent LEC network to provide competing services. This section raises several important implementation questions where action by this Commission is required to advance competition and minimize future disputes.

---

comment on other transitional issues we and the states may face as we move from a monopoly, tariff-based interconnection system to the new system created by Sections 251 and 252.

47/ 47 U.S.C. § 251(c)(3).

Elements to be Unbundled

We first address how the LEC network must be unbundled. We note that the Telecom Act itself defines a "network element" broadly. It is "a facility or equipment used in the provision of a telecommunications service," as well as "features, functions, and capabilities that are provided by means of such facility or function, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service." 48/ We tentatively conclude that this language is intended to require incumbent LECs to make available all aspects of their exchange operation. We invite comments on this conclusion. We also specifically request the LECs to identify and justify any "features, functionality or capability" 49/ that they believe they should be allowed to withhold from the scope of this section of the 1996 Act pursuant to Section 251(d)(2). We expect to scrutinize any such proposed exclusions carefully given the importance of this provision to the Telecom Act's overall goals.

55. We also request comment on the level of unbundling that should be required. Clearly the 1996 Act requires that incumbent LECs unbundle loops, switching, and call termination. Requesting carriers should be allowed to purchase these elements together and combine them, or purchase them separately and use them with other networks or their own facilities. For example, we would expect some requesting carriers to obtain all these elements at first, and then substitute an alternative carrier's loop or termination service at a later date as such competing networks are deployed. In the near term, at least, it would appear that many, if not the majority, of local customers will continue to be served over LEC-owned local facilities. It therefore will be necessary for LECs immediately to provide all the unbundled network elements necessary for competitors to provide local service to these subscribers.

56. We also seek comment on the manner in which network unbundling should be accomplished. Unbundling would appear to require that the network element be available physically separate from other network elements, so that competitors can integrate their own network facilities (or those of a third party) with those of the LEC. The elements must be defined in such a way that

48/ Id. at § 153(a)(45). We also note that "telecommunications equipment" is defined broadly to include all equipment used to provide a telecommunications service except CPE, see id. at § 153(a)(50) and that "telecommunications service" itself similarly is defined very broadly, see id. at § 153(a)(51).

49/ See 47 U.S.C. § 252(d)(2).

competitors can purchase only those LEC network pieces that they need, and not be required to take unnecessary elements. This definition, we tentatively conclude, would require some sub-loop unbundling, as an example. We ask for comment on the specific unbundling requirements that parties believe will be necessary to satisfy the Act's requirements under Section 251(c)(3) and the definition of "network element" under Section 3(a)(45).

57. Unbundling also would appear to require that the element be available independent of any service. This latter requirement would be especially important in connection with the purchase of unbundled local switching. We note that in some state proceedings, unbundled "ports" have been defined to include transport facilities as well as switching. 50/ Under such a definition, a "port" is effectively equivalent to the LEC's bundled retail local service offering minus the loop.

58. Such a definition appears to be inconsistent with the unbundling requirements of the Act. 51/ A purchasing carrier must be able to select the loop and trunking facilities used with LEC switching (including, at its option, loop and trunking facilities purchased from the LEC). The purchasing carrier also must be able to configure the services that will be offered using that unbundled LEC switch. We tentatively conclude that we should define the unbundled local switching element so as to ensure that competitors can access the full capability of the switch, and not be constrained to mimic LEC retail service offerings. 52/

50/ Bell Atlantic of Pennsylvania, for example, has stated that an unbundled port would include "the ability to originate and terminate local and toll calls, but does not include usage or access charges associated with those functions." Proposal of Bell Atlantic for Phase II of Local Competition, filed December 1, 1995, in Application of MFS_I of Pennsylvania, et al., Pennsylvania Public Utility Commission Docket No. A-310203F002, et al., at 16. The Maryland Public Service Commission, in December 1995 order, defined "port" as the basic local service minus the loop: "An unbundled port . . . shall include the switching and usage features contained in [staff's] description of an unbundled port. In this way, all of the functions included within bundled DTL service shall be made available in one of the two unbundled components." Application of MFS-I for Authority to Provide and Resell Local Exchange and Interexchange Telephone Service, Case No. 8584, Phase II, Order No. 72348, released December 28, 1995, at 36 n.22.). As noted above, it would not appear that such definitions would satisfy the statutory unbundling requirements under the new Act.

51/ Such a definition also would not satisfy the requirements of Section 271(c)(2)(B)(iv)-(vi).

52/ An Illinois Commerce Commission staff witness, Jake E. Jennings, has defined the unbundled switching element in the following manner:

> The local exchange network can be broken down into three components: loop, local switch platform (LSP), and interoffice transport. . . . The unbundled LSP [local switch platform] is all services and functionalities that are provided by a switch or end office. These services include: telephone number and directory listing; dialtone; announcements; access to operators, usage , and interexchange carriers; originating

59. The foregoing discussion of unbundled switching is meant to illustrate the kinds of considerations that may need to be taken into account in evaluating the LECs' compliance with Section 251(c)(3). We request information regarding how much more unbundling of the incumbent LEC network is required by Section 251. Is additional unbundling necessary to achieve the Telecom Act's pro-competitive goals? Should we make certain types of unbundling mandatory for all incumbent LECs, and leave further unbundling to negotiation, and further proceedings where negotiations fail? How does this question relate to our ongoing Advanced Intelligent Network proceeding? We also tentatively conclude that Section 251(c)(3), and the broad definition of "network element" in Section 3(a)(45), require that both the physical and the logical elements of the LECs' network be made available. It appears that open access to intelligent network functionalities will be necessary in order for requesting carriers to be able to innovate in their service offerings. We encourage potential "requesting carriers" to be specific in their discussion of the unbundled network elements that they require.

Absence of Use Restrictions

60. Second, Section 251(c)(3) does not on its face restrict how a requesting carrier may use unbundled elements so long as they are employed "for the provision of a telecommunications service." As noted above, "telecommunications service" is defined broadly under the Act. 53/ Thus, it appears that the Act does not permit an incumbent LEC to condition its provision of network elements on how the requesting carrier intends to use those elements to create its own services for others.

61. We note that certain LECs nevertheless have taken the position that unbundled elements only may be used for a local service. We invite them to provide additional explanation for why the Act should be read in such a restrictive fashion. They should comment in particular on how the Commission should distinguish between a "local" and "non-local" service were we to accept this restriction. For example, a requesting carrier may wish to use LEC exchange network elements to create an unlimited calling zone larger than the one reflected in the LEC's own retail service products. Is there any reason why the carrier should be denied the right to make that offering to end users?

62. Certain LECs have taken an even more restrictive view of the 1996 Act. They have suggested that while network elements obtained under Section 251(c)(3) can be used to provide local service to end user subscribers, those elements cannot be used to provide local exchange access to such end users. As we understand this position, requesting

---

and terminating switching; custom calling features (call forwarding, call waiting, etc.); and CLASS features (caller ID, call return, etc.).

Testimony of Jake E. Jennings, ICC Staff Exhibit 1.01, Illinois Commerce Commission Docket No. 95-0458 (filed December 21, 1995), at 7.

53/ See 47 U.S.C. § 153(a)(51).

carriers could purchase loops, switches, and termination service from the incumbent LEC, but only for the purpose of offering local calling to end users. Apparently under this approach the LEC would retain its monopoly over the use of these network elements for the provision of exchange access.

63. We invite comment regarding this approach, but tentatively conclude that it is inconsistent with both the plain meaning of the Act and the statute's pro-competitive intent. As noted above, Section 251(c)(3) contains no such restriction. Furthermore, this interpretation appears to be inconsistent with the Act's intent to allow carriers to use LEC network elements instead of building their own where such construction is inefficient or simply has not yet taken place. This interpretation also appears to be inconsistent with the requirements of Section 271(c)(2)(B), which requires the Bell operating companies to unbundle local loop transmission, local transport and local switching from other network elements and from "other services." 47 U.S.C. 271(c)(2)(B)(iv)-(vi). Presumably the LECs would not deny that a carrier installing its own loop to a customer premise may sell that customer both local service and exchange access to the carrier's long distance services (presumably but not necessarily bundled in the carrier's long distance rates), or exchange access to other carriers.

64. Finally, such an interpretation appears to be inconsistent with the Act's requirement that purchasers of unbundled network elements pay cost-based rates for those elements as discussed in the next section. If a competing carrier has fully compensated the LEC for the cost of the network facilities, then that competing carrier presumably should be able to provide the same services over that network that the LEC provides -- including exchange access. 54/

65. We believe that the most natural reading of Section 251(c)(3) would provide a requesting carrier with the same rights to offer local and exchange access service with respect to a given subscriber whether or not they use incumbent LEC network elements. We invite comment on this issue, but tentatively conclude that no broader use restriction would be permitted by the statute.

Pricing

66. Our tentative conclusion regarding how a carrier may use incumbent LEC network elements is bolstered by the pricing standards applicable to such elements. Those standards assure that the LEC's cost of providing the elements are covered, leaving the LEC no justification for receiving additional compensation in the form of access payments.

54/ Indeed, to the extent LECs use access revenues to maintain low basic local exchange rates, LEC competitors must be able to do the same. We request comment on the likelihood that new LEC rivals will choose to offer low basic local exchange rates to win customers from the LEC, and then make up any remaining local network costs through rates charged for other services such as long distance or ancillary services such as custom calling features like call waiting.

67.More specifically, subsection 251(c)(3) provides that the incumbent LEC must make the network elements available at "rates, terms and conditions" that are "just, reasonable and non-discriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and Section 252." 55/ In turn, Section 252(d)(1) expressly provides that the "pricing standard" for network element charges "shall be based on cost" (including a "reasonable profit") determined without reference to any rate-based methodology and that such prices shall be "non-discriminatory." 56/ As discussed above, this is the same pricing standard that the Act mandates for interconnection provided under Section 251(c)(2).

68.In other words, it appears that the statute affirmatively mandates that LECs set the prices for their network elements at economic cost. The prices clearly must be established "without reference to a rate-of-return or other rate-based proceeding." Instead, the statute provides that the LEC receive its cost and "a reasonable profit." We tentatively conclude that the appropriate cost standard to apply here is Total Service Long Run Incremental Cost ("TSLRIC"). This is a cost standard that is widely used in the states, which should facilitate implementation of this crucial pro-competitive requirement of the Act. This standard covers the LEC's economic cost and reasonable return on investment. And importantly, this cost standard provides that the competitor will be facing substantially the same local network cost structure as the LEC itself as both carriers design their respective service offerings for subscribers. The relative prices of the competitors likely will vary based on other cost factors where the LEC or the rival may be more efficient. But competition will not be distorted by the pricing of the essential LEC network input upon which LEC rivals depend.

69.In a related proceeding involving LEC-CMRS interconnection, we observed that "economists generally agree that prices based on [long-run incremental costs] reflect the true economic cost of a service and give appropriate signals to producers and consumers and ensure efficient entry and utilization of other telecommunications infrastructure." 57/ Thus, economic-cost based pricing will send the correct economic signals to potential investors, encouraging only economically efficient investment. Because it will be consumers who must eventually pay for the investment in facilities, those increased prices should reflect only economically efficient investment. Economic-cost-based network prices also would encourage vigorous retail competition and would drive LECs to reduce their own costs and to reduce prices to consumers.

70.Finally, economic-cost-based pricing of network inputs could reduce substantially the need for regulation of LEC retail rates and service packages. If network

55/ Id. at § 251(c)(3).
56/ Id. at § 252(d)(1).
57/ Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185, Notice of Proposed Rulemaking, FCC 95-505, supra, at para. 47.

input prices are the same for all competitors using the same network, then there is less cause for concern about the potential for anticompetitive pricing of the retail services provided over those facilities.

71. We understand that some LECs may contend that this pricing rule does not permit them to fully recover their existing plant investment. However, TSLRIC should leave the LECs fully compensated because the TSLRIC standard includes recovery of all direct economic costs attributable to use of the LEC network, including a reasonable profit. Because TSLRIC is a long-run standard, moreover, it captures many of the costs that would not be captured in a incremental cost analysis. Embedded cost and historical cost standards, on the other hand, are likely to include costs that are not properly attributable to network elements.

72. We ask parties to comment both on the appropriate standard to be employed under the Act and upon the specific elements that are properly included in calculations under either standard. To the extent that LECs face revenue losses from competition, it should be recognized that they will also have new opportunities to earn revenues in other markets. This is particularly true of the RBOCs, who, for example, will be able to recover common costs from expanding interLATA services outside and inside their regions. It also should go without saying that the incumbent LECs cannot insist on revenue neutrality as we move to a competitive market.

73. We also recognize that this issue could be in part related to universal service questions now under consideration by the Joint Board. Given the need to complete this rulemaking on an expedited schedule, we are prepared to consider interim policies through which we can meet the requirement of the Act that network elements be priced at cost and on a non-discriminatory basis. We do not believe that the incumbent LECs will satisfy their obligations under Section 251 if they charge their competitors for network elements at rates that are above-cost and discriminate in favor of themselves.

74. We tentatively propose to adopt rules to implement TSLRIC-based pricing of network elements under Section 251. We recognize that under the Act states will then have the primary role of implementing this cost standard through their analysis of LEC pricing in general offerings and agreements. 58/ That is as it should be, for the states generally have the resources and expertise to undertake such scrutiny.

75. However, if we adopt this approach, we also stand ready to undertake the appropriate review activity as required in connection with a Section 271 application for authority to commence in-region interLATA service or pursuant to our review responsibility under Section 252(e)(5).

Provisioning and Combination of Elements

58/ See 47 U.S.C. § 252(e)-(f).